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No. 12-10

IN THE

Supreme Court of the United States

AGENCY FOR INTERNATIONAL DEVELOPMENT, *et al.*,

Petitioners,

v.

ALLIANCE FOR OPEN SOCIETY INTERNATIONAL, INC.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

BRIEF FOR *AMICUS CURIAE* HEARTBEAT INTERNATIONAL, INC. IN SUPPORT OF RESPONDENTS

ANDREW PINSON
JONES DAY
51 Louisiana Ave., NW
Washington, D.C. 20001

BRIAN J. MURRAY
Counsel of Record
JONES DAY
77 West Wacker
Chicago, IL 60601.1692
(312) 782-3939
bmurray@jonesday.com

Counsel for Amicus Curiae

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STATEMENT OF INTEREST*

Amicus curiae Heartbeat International is a life-affirming organization that provides resources and leadership development and training to pregnancy help centers, maternity homes, and nonprofit adoption agencies. The 1,300-plus pregnancy help centers affiliated with *Amicus* meet a dire public need by providing over 1.2 million individuals annually with a variety of pregnancy-related services including peer counseling, education, and various kinds of material support.

Affirmative speech requirements regularly threaten the ability of *Amicus* and its affiliates to carry out this work. Indeed, many jurisdictions in the United States have targeted pregnancy help centers with damaging affirmative speech requirements, including laws that compel the centers to provide disclaimers stating their positions on abortions and emergency contraceptives—forcing the centers to raise these sensitive issues according to the government's timing and judgment rather than their own. These requirements threaten to undermine these centers' ability to continue their charitable mission and to communicate their desire to protect the sanctity of all life and their support for alternatives to abortion.

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* Pursuant to Supreme Court Rule 37.6, *Amicus* states that no counsel for a party authored this brief in whole or in part, and no person or entity other than *Amicus* has made a monetary contribution to the preparation or submission of this brief. The parties' letters of consent to the filing of this brief are on file with the Clerk.

SUMMARY OF ARGUMENT

The freedom of speech is one of our first and most fundamental constitutional rights. *Amicus* agrees with Respondents Alliance for Open Society International, Inc. ("AOSI"), *et al.*, that the Policy Requirement in this case imposes an unconstitutional burden on that crucial freedom. *Amicus* submits this brief to help the Court better understand the dangers of approving any such affirmative speech requirement. The experience of pregnancy help centers with affirmative speech requirements demonstrates the significant burdens they place on free speech. The burden on private speech would be no different if imposed as funding conditions, and the fact that such requirements could be tied to vital government "funding" like § 501(c)(3) tax-exempt status (and that doing so would inevitably burden even protected private expression) is especially troubling.

The First Amendment protects speakers from affirmative speech requirements like the Policy Requirement in this case and those targeting pregnancy help centers. The "freedom of speech" the First Amendment secures against government infringement includes the freedom to decide whether to speak, what to say, and how to say it. Affirmative speech requirements inevitably burden these basic rights by taking these protected choices away from the speaker in favor of the government. In doing so, these requirements invade individual "freedom of mind" and conscience by restricting a person's ability to decide for himself whether and how to express his thoughts, ideas, and beliefs; they allow the government to manipulate and distort the First

Amendment-protected open marketplace of ideas by co-opting and skewing private speech to increase the volume of the government's desired message; and they smack of government paternalism—offensive to basic human dignity—which the First Amendment unequivocally rejects.

Pregnancy help centers' continuing struggle against affirmative speech requirements underscores the incompatibility of those requirements with the First Amendment's protection and purposes. Affirmative speech requirements threaten to undermine these centers' core message and charitable mission. Abortion-rights advocacy groups have lobbied for such requirements in jurisdictions across the country, resulting in more than a dozen proposed bills and several enactments. Some of these affirmative speech requirements (including those enacted in New York City and Baltimore) would compel pregnancy help centers that do not provide or refer for abortions or emergency contraceptives to provide disclaimers indicating their position on these services. These requirements would alter the content of the centers' communications with clients by forcing them to adopt the government's judgment on when to introduce such sensitive subjects and by requiring the centers to communicate the government's message that abortions are available as a morally acceptable alternative—a message with which the centers disagree. All of these affirmative speech requirements (1) distort the market of ideas by skewing the centers' speech and ensuring communication of the government's desired message in nearly every place a pregnant woman would go for help and (2) evince the paternalistic view that women who visit pregnancy centers are not smart enough to

get the information they need, and that the government, not pregnancy centers, knows how best to present the various options available to pregnant women. None has survived a First Amendment challenge thus far.

To be sure, unlike the directly coerced speech requirements currently targeting pregnancy help centers, the Policy Requirement imposed by the government in this case is a condition of government funding. But whether such requirements burden speech by direct coercion or by denying eligibilty for a benefit, they still impermissibly penalize or inhibit the complement of rights that make up freedom of speech. And unlike speech restrictions, the government cannot "cure" that burden by providing an alternative channel for expression; once speech is compelled, the burden concretizes, and the bell is irrevocably rung.

Until now, this Court has rightly not recognized a meaningful constitutional distinction between directly coerced speech and speech required as a funding condition. Accordingly, a decision upholding the Policy Requirement here could dramatically erode First Amendment protection against both. Even if the Court tried to draw a line between the two, it would open the door to creative methods of manipulating private speech through government-compelled speech requirements tied to various government benefits. Attaching these onerous requirements to § 501(c)(3) status is a particularly troubling possibility. Moreover, public funding is often inextricably linked with private expression, which makes it inevitable that even affirmative speech requirements tied to public funding will burden protected private speech.

For these reasons, this Court should affirm the Second Circuit's decision, thereby continuing to shield the core political speech of nonprofits like AOSI and pregnancy help centers from the serious burdens caused by affirmative speech requirements imposed by the government.

ARGUMENT

I. EFFORTS TO USE AFFIRMATIVE SPEECH REQUIREMENTS TO BURDEN THE FREEDOM OF SPEECH OF PREGNANCY HELP CENTERS ARE INTENSIFYING EVEN THOUGH THEY ARE CLEARLY UNCONSTITUTIONAL.

A. Affirmative Speech Requirements Imposed By State and Local Governments Threaten To Undermine Pregnancy Help Centers' Charitable Mission.

Over 2,300 pregnancy help centers in all fifty states support women and their families through a wide range of services. These services may include free pregnancy tests; one-on-one, nonjudgmental peer counseling; material assistance; medical referrals; parenting classes; education and employment counseling; risk avoidance education for youth; information on and testing for sexually transmitted diseases; post-abortion counseling; 24-hour hotlines; and referrals to adoption agencies and other support services. *See generally* Family Research Council, *A Passion to Serve*, http://www.apassiontoserve.org/ (last visited Apr. 2, 2012). Centers typically provide these and most other offered services at no cost to their clients. All told, they reach more than 1.2 million people every year.

Through many of these services, pregnancy help centers affiliated with *Amicus* seek to help women considering abortion to understand all of their options and to empower them with alternatives so that they can make more informed decisions. Pregnancy help centers do not offer or refer clients for abortions or emergency contraceptives (in fact,

many do not provide medical services at all). What they do offer is options counseling: honest, complete, and nonjudgmental counseling regarding all pregnancy options. Volunteer counselors provide clients with information on each of their options: They educate women about the joys and challenges of parenting and may offer referrals to support groups and other education sources and services; they present and discuss adoption and offer referrals to agencies with special expertise; and they provide up-to-date, medically accurate information on abortion risks and procedures. *Id.*

Despite the public need they meet, pregnancy help centers face increasing attacks. Particularly over the last several years, abortion-rights advocacy groups have lobbied state and local governments to pass laws imposing damaging regulations on pregnancy help centers. These efforts are little more than a thinly veiled attempt by these groups to advance their pro-choice political agenda by discrediting and distorting the charitable mission and message of these centers. Unfortunately, they have gained some traction, mostly by citing highly suspect "investigative reports" authored by abortion-rights groups like NARAL Pro-Choice America and based on anecdotal "evidence" gathered by their interns posing as fake clients. *See, e.g.*, Family Research Center, A Passion to Serve, Pregnancy Resource Center Service Report 6 (2d ed. 2011), *available at* http://downloads.frc.org/EF/EF12A47.pdf (stating that a doctor testifying in favor of one anti-pregnancy-center bill "conceded that the NARAL study—foundational to the bill—had methodological flaws and was biased.").

Laws imposing affirmative speech requirements on pregnancy help centers pose a particularly troubling threat. Abortion rights activists have teamed with pro-choice legislators in many states to introduce bills that would require pregnancy help centers to provide damaging written and verbal "disclaimers" to every client. Without fail, these proposed disclaimers would substantially damage and interfere with the centers' sensitive relationship with clients and even cause potential clients to turn away.

For instance, some proposed disclaimer requirements would target the core mission of pregnancy help centers by wresting away their decision about how best to communicate with women about their pregnancy options. Specifically, the anti-pregnancy-center bills proposed in various jurisdictions (and enacted in some) would require pregnancy centers that do not perform or refer for abortions or emergency contraceptives to disclose their position on these services via conspicuous signs, initial verbal disclosures, or advertisements (and in New York City's case, all three). *See, e.g.*, Baltimore, Md. City Ordinance 09–252 (2009) *amending* Baltimore City Health Code §§ 40–14(e)(7) and 41–14(6); New York. N.Y., Local Law 17 § 20–815(g) (2011). And a 2009 Michigan bill would have actually forced pregnancy help centers to provide referrals for abortions and emergency contraceptives, effectively forcing the centers to abandon their *raison d'être*. H.B. 5158, 95th Leg., Reg. Sess. (Mich. 2009).

All told, at least a dozen state and local legislatures have recently considered affirmative speech requirements on pregnancy help centers. S. 690, 2008 Reg. Sess., at 2 (Md. 2008); H.B. 1146,

2008 Reg. Sess. (Md. 2008); Baltimore, Md. Ordinance 09–252 (2009) *amending* Baltimore City Health Code §§ 40–14(e)(7) and 41--14(6); Montgomery County, Md. Resolution 16–1252 (2010); H.B. 5158, 95th Leg., Reg. Sess. (Mich. 2009); H.B. 291, 50th Leg., 1st Sess., at 3 (N.M. 2011); Assemb. A03638, 2009–2010 Leg., Gen. Sess. (N.Y. 2009); New York, N.Y. Local Law 17 § 20–815(g) (2011); S. 769, 76th Leg. Assemb., Reg. Sess. (Or. 2011); H.R. 3425, 76th Leg. Assemb., Reg. Sess. (Or. 2011); Austin, Tx. Ordinance 20100408–027 (codified at Code Ch. 10–9 (2010)) (repealed 2012); Austin, Tx. Ordinance 20120126–045 (codified at Code Ch. 10–10 (2012)); S. 188, 2010 Gen. Assemb., Reg. Sess. (Va. 2010); H.B. 452, 2010 Sess. (Va. 2010); S. 6452, 61st Leg., 2010 Reg. Sess. (Wa. 2010); H.B. 2837, 61st Leg., 2010 Reg. Sess. (Wa. 2010); H.B. 2373, 2009 Leg., Reg. Sess. (W. Va. 2009). So far, most have failed to secure passage.

Four of these proposed affirmative speech requirements targeting pregnancy help centers have been enacted, however—those in Austin, Texas; Baltimore and Montgomery County, Maryland; and New York City. While they vary in the details, each of these laws essentially requires pregnancy centers that do not provide or refer for abortions or emergency contraceptives to affirmatively state their position on, or the availability of, these services by sign, verbal disclaimer, or both. Not one has withstood First Amendment challenge thus far. *See Greater Baltimore Center for Pregnancy Concerns, Inc. v. Baltimore*, 683 F.3d 539, 558 (4th Cir. 2012) (awaiting en banc decision); *Tepeyac v. Montgomery Cnty.*, 683 F.3d 591, 594 (4th Cir. 2012) (awaiting en

banc decision); *Evergreen Ass'n v. City of New York*, 801 F. Supp. 2d 197 (S.D.N.Y. 2012).

B. The First Amendment Protects Speakers From Affirmative Speech Requirements

Affirmative speech requirements like these have yet to withstand First Amendment challenge because they contravene basic rights the First Amendment protects and the fundamental purposes it furthers.

1. It is well established that the "freedom of speech" the First Amendment secures against government infringement includes the right to decide whether to speak, what to say, and how to say it. *See, e.g.*, *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796–97 (1988) ("[T]he First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what *not* to say."); *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 573–74 (1995) (explaining that when a speaker chooses to speak, he has the right under the First Amendment to "tailor" or "shape" his speech, both generally and to a specific audience). By "[m]andating speech that a speaker would not otherwise make," *Riley*, 487 U.S. at 795, government-compelled speech restricts or takes away those constitutionally protected choices. This content-manipulative effect of affirmative speech restrictions is inherent, regardless of whether government compels a speaker to communicate a statement of "opinion" or of "fact." Either type of statement "necessarily alters the content" of a speaker's message and therefore "burdens protected speech." *Id.* at 795, 798. For these reasons, "Some of this Court's leading First Amendment precedents have

established the principle that freedom of speech prohibits the government from telling people what they must say," and if it does, its action is subject to "the most exacting scrutiny." *Rumsfeld v. FAIR*, 547 U.S. 47, 61 (2006).

The affirmative speech requirements directed at pregnancy help centers are paradigmatic examples of a constitutionally impermissible burden on free speech rights. Pregnancy help centers seek to offer careful, sensitive, non-judgmental peer counseling to pregnant women. This counseling provides an open and honest discussion of women's options while communicating the centers' deeply held views about the sanctity of life. The various disclaimers proposed for and imposed on the centers by local governments would necessarily alter (and often undermine) this core speech. Such disclaimer requirements burden the free speech rights of pregnancy help centers in two key ways.

First, they force centers to adopt the government's judgment on when to introduce subjects like abortion and birth control. As the Fourth Circuit recognized, this sort of requirement "inevitably alters the course of a center's communications with a client or potential client by requiring that the [p]regnancy [c]enter's initial communication occur in the presence of a stark and immediate statement about abortion and birth-control." *Greater Baltimore Center*, 683 F.3d at 558. Peer counselors are open to having an honest discussion with pregnant women about all of their options, including abortion. But it is their right and prerogative under the First Amendment to decide when and how to approach these sensitive and difficult issues.

Second, compelling this speech requires pregnancy centers "to participate in the City's effort to tell pregnant women that abortions are available elsewhere as a morally acceptable alternative, contrary to the moral and religious beliefs of [these centers]." *Id.* at 552. Mandating that centers communicate these government-supplied messages against their will (and their own judgment) effectively and impermissibly hijacks the centers' constitutionally protected choices about which content and viewpoint to espouse and how to communicate and tailor their own messages.

2. As with other content-based speech regulation, affirmative speech requirements are also incompatible with the various related purposes of the First Amendment as articulated by this Court.

First, affirmative speech requirements contravene the First Amendment's protection of individual freedom of mind by restricting a person's ability to decide for himself whether and how to express his thoughts, ideas, and beliefs. *See, e.g.*, *Turner Broadcasting Sys, Inc. v. FCC*, 512 U.S. 622, 641 (1994) ("At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence."). For instance, a person compelled to salute and pledge allegiance to the flag, or forced to subscribe a patriotic oath, loses the option to protest government action by sitting or not signing, respectively. *See Barnette v. W. Va. State Bd. Of Educ.*, 319 U.S. 624, 642 (1943); *Speiser v. Randall*, 357 U.S. 513 (1958). What's more, if the individual disagrees with the compelled message, he is then effectively forced to

engage in additional speech to disavow that message if he wants to correct a misimpression of his views. Each of these consequences of affirmative speech requirements effectively cedes to partial government control "the individual's ability to define the persona he presents to the world" as well as his individual "freedom of conscience." David B. Gaebler, *First Amendment Protection Against Government Compelled Expression and Association*, 23 B.C. L. Rev. 995, 1004 (1982).

Nonprofit entities that wish to espouse or support specific moral and religious views are particularly affected by the encroachment on individual "freedom of mind" caused by affirmative speech requirements. For instance, the disclaimer requirements targeting pregnancy help centers force them to significantly alter the message they wish to present to clients—*i.e.*, their message that compassionate, moral, sensible alternatives to abortion exist, and that their mission focuses on those options. An upfront, stark disclaimer that they do not offer or refer for abortion or emergency contraceptives seriously distracts from that message and undermines its impact.

Second, affirmative speech requirements allow the government to manipulate and distort the "open marketplace" the First Amendment creates so that "differing ideas about political, economic, and social issues can compete freely for public acceptance without improper government interference." *Knox v. Serv. Emps. Int'l Union*, 132 S. Ct. 2277, 2289 (2012). Affirmative speech requirements are especially dangerous tools of market distortion because they co-opt a class of private speakers as the vehicle for the desired government message. Instead of simply

injecting the government's independent message into the market, they also necessarily "skew" the message of all of the private speakers compelled to communicate the government's message. *See* Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 Iowa L. Rev. 1377, 1491 (2001). This problem is exacerbated if recipients of the message do not recognize the role of the government in compelling it, *id.*; in such circumstances, the government has essentially hijacked private speech and altered it to better fit its desired message or outcome with many recipients none the wiser.

These market-distorting features are evident in the affirmative speech requirements targeting pregnancy help centers. For instance, laws that require the centers to disclose that they do not offer or refer for abortions or emergency contraceptives force them "to participate in the City's effort to tell pregnant women that abortions are available elsewhere as a morally acceptable alternative." *Greater Baltimore Center for Pregnancy Concerns*, 683 F.3d at 552. This means that nearly every place a pregnant woman might visit for help will communicate to them the government's desired message that abortions are available and morally acceptable, despite the existence of a substantial portion of speakers (the centers in particular) in that group of organizations who disagree. This government-mandated drowning-out of that alternative view is made worse by the fact that the very entities who would hold and communicate that view (the centers) must also provide the government's view, thus altering the content and overall effect of their own message.

Third, affirmative speech requirements smack of a government paternalism that the First Amendment unequivocally "rejects." *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 791 & n.31 (1978) (explaining that the First Amendment "rejects the 'highly paternalistic' approach of statutes ... which restrict what the people may hear" or say simply out of fear that hearing or speaking it would be harmful to their own best interests). Governments typically impose affirmative speech requirements under the patronizing assumption that the speaker will fail to provide information which—in the government's view—its audience needs to hear, or that the speaker will fail to communicate the message in a way the listener can understand. But as with speech restrictions, the First Amendment requires a different presumption: "The First Amendment mandates that we presume that speakers, not the government, know best both what they want to say and how to say it." *Riley*, 487 U.S. at 790–91. As for listeners, "our traditional understanding, embodied in the First Amendment, [is] that where the dissemination of ideas is concerned, it is safer to assume that the people are smart enough to get the information they need than to assume that the government is wise or impartial enough to make the judgment for them." *Id.* at 804 (Scalia, J., concurring). Nothing less would comport with the "human dignity inherent in all persons," *Brown v. Plata*, 131 S. Ct. 1910, 1928 (2011).

The affirmative speech requirements targeting pregnancy help centers certainly evince this paternalistic mindset. Legislators have cast these laws as necessary "disclaimers" under the assumptions that (1) the centers do not know how

best to present pregnant women with their options, and (2) clients of the centers may or will be misled into believing, *e.g.*, that the volunteer counselors are actually doctors or nurses, or that the centers will perform or refer for abortions or give out emergency contraceptives, or even that abortions are not legally available. In short, such requirements presume that the government, rather than the pregnancy help centers, know the best way to present the pregnancy-options discussion. A government is certainly entitled to that belief, but this Court has never considered such a paternalistic interest a sufficient reason to burden First Amendment expression.

II. THE DECISION IN THIS CASE WILL IMPACT THE FIRST AMENDMENT PROTECTION OF PRIVATE NONPROFIT ORGANIZATIONS AGAINST AFFIRMATIVE SPEECH REQUIREMENTS.

In this case, Respondents challenge an affirmative speech requirement imposed by the government. Unlike the affirmative speech requirements generally faced by pregnancy help centers, this one—which requires organizations to adopt a specific, government-provided policy statement—is a condition of government funding rather than a directly coerced speech requirement. As a constitutional matter, however, this Court has never deemed this distinction dispositive. Both types of affirmative speech requirements burden the complement of rights that make up First Amendment freedom of speech and contravene the various purposes animating the Amendment. Accordingly, a decision upholding affirmative speech requirements imposed as funding conditions could deal a

significant blow to the First Amendment's protection of individuals and private organizations against government-compelled speech generally. Even if the Court recognized a novel distinction between compelled-speech funding conditions and directly coerced speech, upholding the Policy Requirement based on that distinction would still erode First Amendment protection by opening a significant loophole through which governments could impose affirmative speech requirements. For nonprofit organizations, one of the more concerning consequences is the possibility of affirmative speech requirements tied to § 501(c)(3) tax-exempt status, but the possibilities for potential abuse are virtually endless. And given the practical reality that public funding is often inextricably linked to private expression, protected speech will almost certainly be burdened as a side effect of a funding-condition loophole.

A. Affirmative Speech Requirements Burden Freedom of Speech Whether Imposed Directly Or Tied To Public Funding.

This Court has firmly established that "the government may not deny a benefit to a person on a basis that infringes his constitutionally protected ... freedom of speech even if he has no entitlement to that benefit." *FAIR*, 547 U.S. at 59 (quoting *United States v. American Library Ass'n, Inc.*, 539 U.S. 194, 210 (2003)). The reason for this "unconstitutional conditions" doctrine is straightforward:

> [I]f the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and

> inhibited. This would allow the government to 'produce a result which (it) could not command directly.' Such interference with constitutional rights is impermissible.

Perry v. Sindermann, 408 U.S. 593, 597 (1972) (quoting *Speiser*, 315 U.S. at 526).

It is no answer to this objection to say that there is no real burden when speech is restricted or compelled as a condition of eligibility for a government benefit because a potential benefit recipient may simply refuse the funds. *See FCC v. League of Women Voters of California*, 468 U.S. 364 (1984) (invalidating a funding condition that banned editorializing by broadcast television stations, even though those stations could have avoided the restriction by forgoing the funding). If government action unconstitutionally burdens an individual's First Amendment rights, that burden is not magically cured simply because the government imposes the burden by denying eligibility for a government benefit rather than by simple coercion backed by criminal or civil penalties. Either form of burden suffices to impermissibly "penalize" or "inhibit" the right in question. *Perry*, 408 U.S. at 597; *Speiser*, 315 U.S. at 526.

This goes double for affirmative speech restrictions framed as conditions on government benefits because of the front-loaded, irrevocable nature of the burden imposed by compelled speech. This Court has permitted some speech *restrictions* as conditions on funding when those restrictions are placed on the government program being funded rather than on the recipient of the program's benefits. *See Rust v. Sullivan*, 500 U.S. 173 (1991); *Regan v. Taxation*

With Representation, 461 U.S. 540 (1983). But, crucially, in these cases the recipient of funds could still freely express the restricted message through alternative, privately funded channels. *Compare Rust*, 500 U.S. at 197–98 *with League of Women Voters*, 468 U.S. at 399–402. Unlike restrictions on speech, the burden imposed by requiring an individual to speak a particular message cannot be "cured" by allowing the speaker an adequate alternative channel. As discussed above, the burden with this type of requirement comes as soon as the individual speaks the compelled message, which takes away the constitutionally protected choice whether to speak at all, "necessarily alters the content" of the speaker's message, *Riley*, 487 U.S. at 795, and impermissibly constrains his protected rights to "tailor" and "shape" that message, *Hurley*, 515 U.S. at 573. These bells cannot be unrung; the idea that providing an alternative channel would somehow ease that burden by allowing the speaker to *not* speak the message after he has already spoken it is as silly as it sounds.

For this reason, distinguishing between speech restrictions as funding conditions and affirmative speech requirements as funding conditions, and flatly prohibiting the latter, makes excellent sense. Indeed, when eligibility for a government benefit is instead made contingent on required *affirmative* speech, this Court has deemed it a violation of the First Amendment. *See Speiser*, 357 U.S. at 518 ("It cannot be gainsaid that a discriminatory denial of a tax exemption for engaging in speech is a limitation on free speech. ... To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech.").

Making a government benefit contingent on an affirmative speech requirement also undermines the purposes of the First Amendment in the same way as directly coerced speech. In particular, the distorting effect on the marketplace of ideas will likely be similar regardless; if the benefit the government dangles to compel the speech is enticing—which it will be if the government wants to change speakers' behavior—it is fair to expect a similar increase in volume and proportion of the government's desired speech in the relevant market of ideas. And nothing at all changes with respect to the skewing effects and attribution problems caused by affirmative speech requirements. Moreover, because the burden to individual freedom of expression caused by affirmative speech requirements as funding conditions is similar (and not curable by alternative channels), they similarly would continue to interfere with the "freedom of thought" the First Amendment is meant to protect against state action. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977).

B. Approving The Policy Requirement Would Expose Even Private Nonprofit Organizations And Individuals To Government-Imposed Burdens On Their Protected Speech.

Because this Court has not recognized a meaningful constitutional distinction between direct affirmative speech requirements and those imposed as funding conditions, a decision upholding the affirmative speech requirement in this case could deal a significant blow to every individual's protection against government-compelled speech. To *Amicus*'s knowledge, a decision approving the

affirmative speech requirement in this case would be the Court's first to bless government authority to compel a private individual or organization to communicate a political message on its own behalf with particular content chosen by the government.

It goes without saying that this kind of erosion of this Court's so-far uniform rejection of affirmative speech requirements could make it harder for private organizations to defend against even directly coerced speech requirements. In fact, precisely because the Court has not distinguished between compelled-speech funding conditions like the Policy Requirement and direct speech regulations like those targeting pregnancy help centers, it may be only a small leap from upholding the former to approving the latter in the "right" case (perhaps a case in which the affirmative speech requirement seems wholly neutral, unobjectionable, and factual). At the least, upholding the Policy Requirement could constitute a step towards this slippery slope.

If the Court were to draw a new line between compelled-speech funding conditions and directly coerced speech, the results would certainly be just as disastrous. For that would open the door for creative methods of manipulating or controlling private speech through affirmative speech requirements tied to various government benefits. Perhaps the most troubling specter of such a result would be new affirmative speech requirements tied to an organization's status as a religious, educational, charitable, scientific, or literary organization under 26 U.S.C. § 501(c)(3). That status exempts these nonprofit organizations from taxes and allows taxpayers to deduct their contributions to the

organizations on their tax returns. This Court has already said that both of these benefits—the exemption and the deduction—"are a form of subsidy that is administered through the tax system" because both are effectively "cash grants." *TWR*, 461 U.S. at 544. The upshot under this Court's unconstitutional conditions doctrine is that Congress can—at least sometimes—make § 501(c)(3) status contingent on compliance with speech restrictions. *See id.* at 550–51 (permitting Congress to condition § 501(c)(3) status on *not* engaging in "substantial lobbying," reasoning that organizations could still lobby using an also tax-exempt § 501(c)(4) affiliate and still receive tax-deductible contributions to its non-lobbying activity).

The danger of a decision by this Court supplying government the power to condition receipt of benefits on not just speech restrictions, but also on affirmative speech restrictions, thus comes into focus. It is not a stretch to suggest that upholding the Policy Requirement in this case could allow Congress to force all 501(c)(3) organizations to communicate the government's desired messages as a condition of obtaining and maintaining that status. This would provide the government an end-around for imposing affirmative speech requirements it could not impose directly. For example, Congress could impose a condition on § 501(c)(3) status requiring organizations to:

- adopt a policy stating that they "do not advocate the overthrow of the Government of the United States," *Speiser* 357 U.S. at 515;

- post signs and provide verbal disclaimers that the entity's "status as a § 501(c)(3) organization does not reflect the U.S. government's approval of its message or mission"; or
- if they are a scientific or educational organization, provide disclaimers that their "status as a 501(c)(3) organization does not indicate U.S. government approval of or agreement with its teachings or research."

Maybe none of these affirmative speech requirements seems especially radical, but each of them, like any such requirement, "necessarily alters the content" of each organization's speech and would impermissibly burden freedom of speech if imposed directly. In fact, the first disclaimer is nearly identical to the oath requirement this Court struck down in *Speiser*. The latter two examples are similarly burdensome; they could undermine the public's trust in these organizations at first contact and thus damage their ability to communicate their desired messages.

This sort of law likely would exert even more pressure than the typical funding condition; many already-existing nonprofit organizations likely could not survive without tax-exempt status and charitable contributions from private individuals. Those organizations would be all but forced to speak the government's message, despite the fact that it will "necessarily alter" and quite possibly detract from or even contradict their own message and mission. And unlike the law against § 501(c)(3) lobbying in *Regan*, there would be no way to cure the burden imposed by the affirmative speech requirement with an

alternative channel; once speech is forced, the burden becomes concrete, the bell irrevocably rung.

Imposing an affirmative speech requirement as a condition of § 501(c)(3) status would even burden the speech of organizations that could survive without these tax subsidies. If an organization chose to renounce its § 501(c)(3) status to shake off the affirmative speech requirement, taxpayers could no longer deduct contributions to those organizations. This would surely decrease the overall funding of those organizations; even if taxpayers still chose to contribute, they would likely contribute less because they would lose the benefit of reduced tax liability. As a constitutional matter, restricting funding for protected expression equates to burdening the expression itself because it "necessarily reduces the quantity of expression." *See, e.g. Citizens United v. Federal Election Com'n*, 130 S. Ct. 876, 898 (2010) (quoting *Buckley v. Valeo*, 424 U.S. 1, 19 (1976) (per curiam). In short, an affirmative speech restriction tied to § 501(c)(3) would burden protected speech merely by existing; organizations that elected to remain § 501(c)(3) organizations would be compelled to speak a government message, and organizations that gave up that status to avoid the affirmative speech requirement would likely have to reduce the quantity of their own speech as a consequence.

This potential 501(c)(3) loophole is a large one; it would apply to every religious, educational, charitable, scientific, or literary organization—nonprofits all—that wishes to avail itself of tax-exempt status and receive tax-deductible donations under § 501(c)(3). This includes pregnancy help centers affiliated with *Amicus* and similar

organizations. Pregnancy help centers are almost entirely funded by the charitable giving of private individuals (most do not receive public funding). Yet as a result of receiving even private funds, these centers could be attacked with the very affirmative speech restrictions that their ideological opponents have worked to enact for the past decade.

A second example in the context of the pregnancy help centers underscores the hazards of upholding the Policy Requirement as a permissible compelled-speech funding condition. While these centers run almost entirely thanks to private funding, some centers do receive a portion of proceeds from sales of "Choose Life" license plates available in 30 states. Choose Life America, Inc, http://www.choose-life.org (last visited Apr. 2, 2013) ("[T]he real Choose Life License Plate ... raises funds to support adoption efforts of Crisis Pregnancy Centers, Maternity Homes and not-for-profit adoption agencies."). Thus, a rule that the government may compel speech as a condition of funding would ostensibly allow it to do so here as a backdoor method of burdening the speech of pregnancy help centers. Indeed, Virginia legislators have already tried to tie pregnancy help centers' eligibility for these Choose Life license plate proceeds to disclaimer requirements similar to those discussed above. *See* S. 188, 2010 Gen. Assemb., Reg. Sess. (Va. 2010); H.B. 452, 2010 Sess. (Va. 2010).

Like the hypothetical § 501(c)(3) conditions, a law conditioning receipt of license-plate proceeds on affirmative speech would have secondary viewpoint-based speech-burdening effects, too. The license plates themselves are a form of protected political speech. *See Wooley*, 430 U.S. at 715 (calling a car

with a state-mandated "Live Free or Die" license plate a "'mobile billboard' for the State's ideological message"). Individuals buy these license plates in large part to help support organizations like pregnancy centers that carry out charitable missions they wish to aid. *See* Choose Life America, Inc, http://www.choose-life.org (last visited Apr. 2, 2013) (asking people to buy the plates to support "adoption efforts of Crisis Pregnancy Centers, Maternity Homes and not-for-profit adoption agencies"). If such ordinances forced pregnancy help centers to stop receiving this minor source of funding to avoid a harmful affirmative speech requirement, it would burden these individuals' speech by foreclosing one avenue for that speech, namely their funding of the centers. Moreover, it would reduce individuals' incentive to buy the plates. The quantity of mobile billboards displaying this speech would be significantly reduced as a result.

In sum, by tying these affirmative speech requirements to eligibility for proceeds of expressive license plates, governments could manipulate the market of ideas simply by passing the funding condition: If pregnancy help centers acquiesce to the affirmative speech requirement, they increase the volume and proportion of the government's desired message. If centers choose to drop the funding instead, the government has effected a reduction of the volume and proportion of a potentially undesired message by those private individuals who would otherwise fund the centers and install the plates. Upholding the Policy Requirement in this case would legitimize these sorts of underhanded approaches to attacking the freedom of speech of individuals and nonprofit organizations like pregnancy help centers.

(Indeed, this method of can be extrapolated both to all of the many specialty license plates offered by states that help support nonprofit organizations of all kinds and to other, similar programs.)

The broader point is that public funding is everywhere, and it is often inextricably linked to private expression. Allowing governments to condition public funding of organizations (especially those that seek to communicate political or religious messages) on compliance with affirmative speech requirements could have expansive and troubling consequences for the continued vitality of individual freedom of thought and a marketplace of ideas unfettered by government control and paternalism. The secondary speech-burdening effects of such requirements—*i.e.*, the fact that the incentive these requirements create for an organization to decline public funding could, depending on the way the funding mechanism works, decrease both private speech and private funding of those organizations—are especially concerning.

* * *

For all these reasons, this Court should affirm the Second Circuit's decision, thereby continuing to shield the core political speech of private nonprofits like pregnancy help centers from the serious burdens caused by affirmative speech requirements imposed by the government. "The First Amendment creates an open marketplace in which differing ideas about political, economic, and social issues can compete freely for public acceptance without government interference." *Knox*, 132 S. Ct. at 2288 (internal quotation marks omitted). *Amicus* welcomes open discourse in the marketplace of ideas. It simply asks

for a level playing field not tilted by paternalistic government manipulation of political and religious expression, especially when directed only at certain speakers or viewpoints. Affirmative speech restrictions like the Policy Requirement in this case and those leveled at pregnancy help centers around the country allow just such manipulation by burdening, distorting, and ultimately hijacking the protected expression of private organizations. As this Court has made clear, "the government, even with the purest of motives, may not substitute its judgment as to how best to speak for that of speakers and listeners; free and robust debate cannot thrive if directed by the government." *Riley*, 487 U.S. at 791. *Amicus* asks this Court to affirm the ruling below to stave off proliferation of these invidious requirements.

Respectfully submitted,

ANDREW PINSON
JONES DAY
51 Louisiana Ave., NW
Washington, D.C. 20001

BRIAN J. MURRAY
Counsel of Record
JONES DAY
77 West Wacker
Chicago, IL 60601-1692
(312) 782-3939
bmurray@jonesday.com

Counsel for Amicus Curiae

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